



## General Assembly

Distr.: General  
22 November 2007

Original: English

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**United Nations Commission  
on International Trade Law**  
Resumed fortieth session  
Vienna, 10-14 December 2007

### **UNCITRAL rules of procedure and methods of work**

#### **Note by the Secretariat\***

#### **Observations by the United States**

The Government of the United States submitted to the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) observations concerning UNCITRAL rules of procedure and methods of work. The text of the observations is reproduced as an annex to this note in the form in which it was received by the Secretariat, with formatting changes.

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\* The Secretariat received the United States observations annexed to this note on 21 November 2007.



## Annex

# US Observations on UNCITRAL's Rules of Procedure and Methods of Work

## Note to the Secretariat

### I. Introduction

1. For 40 years UNCITRAL has served as a highly effective UN body working to provide the world the framework to support global trade and business. Member and observer states can be proud of their contributions over the decades in the development of international commercial practices in the context of model laws, legislative guides, treaties and other international legal texts. Many of these instruments have been adopted or are serving as models for legal developments around the world.

2. The Commission's rules of procedure and work methods are very clearly explained in the Secretariat's Note, which is available on the Commission's web site.<sup>1</sup> This paper should be the basis for any review of UNCITRAL rules of procedure and working methods. It demonstrates that the Commission's rules of procedure and work methods work well and have been a significant contributing factor in producing UNCITRAL's distinguished track record.

3. This Note reviews various proposed changes to the Commission's rules of procedures and methods of work in light of the Secretariat's Note. It offers modest suggestions concerning possible ways in which the Commission's methods of work might be improved.

### II. UNCITRAL Rules of Procedure

4. Contrary to the suggestion by some, UNCITRAL does operate under the Rules of Procedure of the General Assembly. The Secretariat paper gives a thorough commentary of how these rules have evolved to suit the specific needs of the Commission.<sup>2</sup> At the first session of UNCITRAL in 1968, States decided on the basis of rule 161 of the Rules of Procedure of the General Assembly that the rules of procedure of Committees (now rules 96-133) as well as rules 45 and 60, would apply to UNCITRAL, since it is a subsidiary organ of the General Assembly. The Commission further decided that it would be guided by the general principle that the rules of procedure of the GA would apply *mutatis mutandis* to the Commission, as appropriate for the performance of its functions. Since that time the Commission and its working groups have followed these general procedural rules, subject to decisions by the Commission to alter specific rules.<sup>3</sup>

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<sup>1</sup> *UNCITRAL rules of procedure and methods of work*, UN Doc. A/CN.9/638 and Add 1-Add 6, available at <http://www.uncitral.org/uncitral/en/commission/sessions/40th.html#second> [hereinafter Secretariat Rept.].

<sup>2</sup> *Id.*, UN Doc. A/CN.9/638/Add.1-Add.6.

<sup>3</sup> *Id.*, UN Doc. A/CN.9/638, paras. 4-12.

5. In light of the clarification provided in the Secretariat's Note, drafting an entire new set of procedural rules is not necessary. Such a revision would be time-consuming, difficult to negotiate, and divert attention from UNCITRAL's important substantive work.

### III. Decision Making

6. Most states have welcomed the fact that UNCITRAL decisions have been made without the need for a formal vote. The General Assembly has repeatedly commended UNCITRAL for having reached its decisions by consensus.<sup>4</sup> By seeking to find solutions that are generally acceptable, UNCITRAL has avoided politicization and entrenched disagreement, remained technically focused, and established itself as an effective standard setting organization. This method of work has benefited countries in all economic stages, especially developing and emerging states.

7. The Secretariat's paper includes a comprehensive commentary on decision making within UNCITRAL and the General Assembly generally, and should provide helpful clarification for those States that are new members of the Commission or are not familiar with the practices of the Commission.<sup>5</sup>

8. At its first session in 1968, States expressed the general view that every effort should be made to reach all decisions by consensus. Since that time the Commission has consistently followed this view. Indeed, there has been only one formal vote in the entire history of the Commission (on a procedural matter concerning the move of the Secretariat to Vienna in 1973).<sup>6</sup>

9. UNCITRAL's use of consensus is consistent with the long established and common practice of the General Assembly, its Committees, subsidiary organs, and plenipotentiary conferences.<sup>7</sup> The opinions of the United Nations Office of Legal Affairs (quoted in the Secretariat paper) conclude that there is no definitive or authoritative interpretation of consensus and it is somewhat difficult to arrive at an exact definition of the term.<sup>8</sup> The Office of Legal Affairs has concluded that a decision may be considered as having been made "by consensus" if the decision was "arrived at as a result of a collective effort to achieve a generally acceptable text and consequently the participating delegations are considered to be more closely associated with the decision."<sup>9</sup>

10. The legal opinions of the UN Office of Legal Affairs stress that consensus should not be confused with unanimity.<sup>10</sup> The Commission records demonstrate that in a number of instances, subsidiary organs have adopted decisions on the basis of consensus, despite reservations or opposition regarding some aspects of the decision. It is a well-established custom within the UN and UNCITRAL that in such

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<sup>4</sup> See e.g., GA resolutions 43/166, 42/152, 41/77, 40/71, 39/82, 38/134.

<sup>5</sup> Secretariat Rept, UN Doc. A/CN.9/638/Add.4.

<sup>6</sup> *Id.* at UN Doc. A/CN.9/638/Add.4, paras. 2-15. GA Rules 124-133 set forth the relevant rules of procedure concerning voting for the Commission.

<sup>7</sup> *Id.*, paras. 16-24.

<sup>8</sup> Secretariat Rept., UN Doc. A/CN.9/638/Add.4, para. 20.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*, para. 23.

situations, any reports clearly reflect any dissents to decisions that have been made by consensus.<sup>11</sup>

11. The UN legal opinions also underscore that consensus cannot be imposed on any member state of a subsidiary organ. Any member may insist on its Charter given right to exercise its vote and if a member formally requests that a vote be taken, such a vote must be taken.<sup>12</sup>

#### **IV. Participation of Observers**

12. UNCITRAL is a technical body that does not operate in the political realm, but instead brings together the best legal minds from member and non-member countries as well as expert observers to facilitate discussion. The Secretariat's Note provides a very important discussion of the decisions that have been taken by the Commission and the General Assembly concerning the participation of observers in the work of UNCITRAL.

13. General Assembly Resolution 2205 (XXI), which established UNCITRAL, provided that the Commission may establish working relationships with nongovernmental organizations concerned with the progressive harmonization and unification of the law of international trade.<sup>13</sup> At its inception UNCITRAL adopted a workable method (administered by the Secretariat in consultation with Member States) for identifying those non-state entities with particular knowledge, expertise, or experience in the subjects under consideration.<sup>14</sup> The Secretariat has sent invitations to nongovernmental organizations for each session of the Commission and its Working Groups. The Secretariat has generally only issued invitations to organizations with specific expertise on the issues under consideration.<sup>15</sup> The Commission has repeatedly recognized that the participation of nongovernmental organizations with international expertise is critical to the quality of texts formulated by the Commission, as well as its program of work.<sup>16</sup> The General Assembly has also on several occasions affirmed the practices of the Commission, as well as the importance of the participation of observers from interested organizations with international expertise at the sessions of the Commission and its working groups.<sup>17</sup>

14. The concerns raised about the participation of NGOs can be resolved by simply clarifying existing rules, rather than introducing new rules. Such clarifications should include:

(a) having the relevant standards and expectations about participation of non-member states, international governmental organizations, specialized agencies, and non-governmental organizations restated in the letter of invitation to the observer delegation or in the Commission's report;

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<sup>11</sup> *Id.*, paras. 11 and 21.

<sup>12</sup> *Id.*, para. 23.

<sup>13</sup> *See id.*, paras. 20-21.

<sup>14</sup> *Id.*, at UN Doc. A/CN.9/638/Add.5, paras. 22-25.

<sup>15</sup> *Id.*, paras. 26-29.

<sup>16</sup> *Id.*, paras. 30-31.

<sup>17</sup> *See id.*, para. 32 and GA resolutions 57/20, 39/82, 38/134, 37/106, 36/32.

(b) handling participation by non-governmental observers according to two categories of nongovernmental observers, i.e. those with a “general interest for international commerce” which can be granted a permanent status, and those with “special expertise” in one of the topics discussed, which should not be admitted beyond the duration of the particular subject in which they have expertise;

(c) continuing to remind observer organizations of their role as contributors of technical information, information on practices of an affected economic or commercial sector, and other relevant information, and that they do not participate as decision makers.<sup>18</sup>

15. Like many technical UN bodies, the work of UNCITRAL cannot be done effectively without expert observer participation. Limiting this participation could jeopardize UNCITRAL’s relevance and could ultimately take the discussion of these important private international law issues wholly out of the UN.<sup>19</sup>

## V. Languages

16. Member states have welcomed the fact that UNCITRAL is the only UNGA organization whose entire website is available in all six official UN languages. Some states have raised the issue of whether UNCITRAL should provide language services at informal governmental and intercessional expert group meetings. The proposal, however, has substantial resource implications.

17. As noted in the Secretariat’s paper, the requirements of the General Assembly concerning working and official languages are set forth in rules 51-57 of the Rules of Procedure of the General Assembly and by its subsequent resolutions.<sup>20</sup> According to the legal opinion of the Office of Legal Affairs, informal meetings, consultations, or negotiations are outside the formal rules of procedure.<sup>21</sup> The large majority of UN bodies and organizations, like UNCITRAL, do not have adequate resources for translation of documents or interpretation services for informal experts meetings or informal negotiations because of the budgetary limitations.<sup>22</sup>

18. That said, the Secretariat could, to the extent feasible, and within existing resources, provide translation into one or more additional languages at informal intercessional expert meetings. Full interpretation into all working languages at informal meetings, however, would require additional resources, which could only be allocated by the General Assembly (Fifth Committee) in its budgetary and financial planning process.

<sup>18</sup> There is no disagreement that member states make the decisions at the Commission’s meetings (and not other intergovernmental organizations, specialized agencies or non-governmental organizations). See Secretariat Rept, UN Doc. A/CN.9/638/Add.5, para. 36.

<sup>19</sup> The proposal to limit the right of non-state entities to speak or distribute documents goes too far and would sharply cut back on their contributions to the work of UNCITRAL. For a description of the current practices of the Commission concerning the participation of observers in the work of UNCITRAL see *id.*, paras. 33-59.

<sup>20</sup> The Secretariat’s commentary concerning these rules is contained in UN Doc. A/CN.9/638/Add.6, paras. 1-25.

<sup>21</sup> *Id.*, para. 11.

<sup>22</sup> *Id.*, paras. 12-17.

## VI. Public and Private Meetings

19. Another issue raised by some States concerns the possibility of closing working group meetings, as is done in some political bodies of the UN. As the Secretariat's Note explains, the general principles of the General Assembly concerning public and private meetings are set forth in rules 60 of the Rules of Procedure of the General Assembly.<sup>23</sup> That rule provides that: "The meetings of the General Assembly and its Main Committees shall be held in public unless the organ concerned decides that exceptional circumstances require that the meeting be held in private. Meetings of other committees and subcommittees shall also be held in public unless the organ concerned decides otherwise."

20. For this Commission to remain effective and relevant, all Commission and working group meetings should continue to be held, as they have for the past 40 years, in public. One of the hallmarks of the Commission's successful work methods has been its open and public process. Transparency and participation by knowledgeable and affected groups, including international and non-governmental organizations and private sector representatives, in working group meetings are key to UNCITRAL's success.<sup>24</sup>

## VII. Methods of Work

21. The Secretariat's Note also contains a comprehensive explanation of UNCITRAL's method of work.<sup>25</sup> It demonstrates that the current methods are sound and should be continued.

### *Working Group Mandates*

22. As the Secretariat's paper points out, initially Commission working groups were made up of limited membership with specific mandates.<sup>26</sup> However, the Commission more recently has adopted full member working groups.<sup>27</sup> As a result, the mandates have been more broadly defined and discretion has been given to working groups with regard to implementation and interpretation of the mandate and decisions regarding working methods.<sup>28</sup>

23. This practice should continue. The status of work in and any recommendations concerning the mandate of each working group are reviewed at each Plenary session, and any changes can be made where needed under existing procedures.

### *Preparatory Work*

24. It is common practice for each working group to request the Secretariat to prepare studies and other documents that are necessary for the continuation of their

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<sup>23</sup> For the Secretariat's explanation of these rules see UN Doc. A/CN.9/638/Add.1, paras. 5-8.

<sup>24</sup> One delegation has suggested that the Commission should authorize a working group meeting to be held in camera if one or more delegations belonging to the group request it. Under the applicable rules this should only be authorized by the body in truly exceptional circumstances.

<sup>25</sup> *Id.* at A/CN.9/638 at paras. 13-32.

<sup>26</sup> *Id.*, A/CN.9/638, paras. 27-31 and A/CN.9/638/Add.1, paras. 25-26.

<sup>27</sup> *Id.*, A/CN.9/638/Add.1, para. 27.

<sup>28</sup> *Id.*, A/CN.9/638, para. 32 and A/CN.9/638/Add.1, paras. 28-29.

work. The Commission has also decided that, as a general rule, work of the working groups should be preceded by the Secretariat's preliminary work on the subject.<sup>29</sup> In light of the limited resources available to the Secretariat, the Commission and its working groups have vested the Secretariat with a measure of discretion in the implementation of its tasks.<sup>30</sup> It is also common practice for the Commission and the working groups to authorize the Secretariat to have assistance of outside experts in the completion of its preparatory work, as in most other UN bodies.<sup>31</sup> Such assistance may take various forms, most commonly as intersessional informal expert group meetings.<sup>32</sup> This practice should continue. Any preparatory work of the Commission is, of course, subject to the review of the Working Group, and ultimately the Commission.<sup>33</sup>

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<sup>29</sup> *Id.*, A/CN.9/638/Add.1, para. 33.

<sup>30</sup> *Id.*, para. 36.

<sup>31</sup> *Id.*, para. 38.

<sup>32</sup> *Id.*

<sup>33</sup> It is not feasible or desirable for the Commission to give advance approval for all informal meetings of expert groups, as has been suggested. Of course, any member state of UNCITRAL has the right to participate in any such meetings. When the Commission authorizes a colloquium, it should ensure that the dates and location are known to member states and that representatives from member states may attend. Nonetheless, it is not appropriate for the Secretariat to be charged with the responsibility of determining when controversial points have been raised by non-states at colloquia or seminars or for calling formal meetings of UNCITRAL.